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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LAURA MAIN, Plaintiff and Appellant, v. MOHAMED MOSLEH, Defendant and Respondent.	B265445 (Los Angeles County Super. Ct. No. BC500221)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Reversed and remanded.

Blum Collins and Craig M. Collins for Plaintiff and Appellant.

Early Maslach, Steven M. McGuire and B. Eric Nelson for Defendant and Respondent.

INTRODUCTION

Plaintiff Laura Main's automobile was damaged in a collision caused by defendant Mohammad Mosleh. Main recovered from her insurance carrier the full amount of the damage minus her $500 deductible. In her ensuing negligence action against Mosleh, the trial court entered judgment for Main in the amount of $500. Main appeals contending that the trial court erred by refusing to apply the collateral source rule to hold Mosleh liable for the full amount of the damage he caused. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The parties stipulated to the following facts: Mosleh and Main were involved in an automobile accident at the intersection of Crenshaw and Wilshire Boulevards in Los Angeles. Mosleh does not dispute liability for the collision which caused $28,955.85 in damage to Main's vehicle. Main's first-party insurer, State Farm Mutual Automobile Insurance Company (State Farm), paid her for all of the damage except the $500 deductible. Main has been compensated for, or has waived, all other claims (such as loss of use and personal injury), except for prejudgment and postjudgment interest and litigation costs.

Main's attorney notified State Farm of the existence of this action and asked the insurer to take over the prosecution of the lawsuit. State Farm has neither intervened in this case nor filed a separate action against Mosleh. No payments or settlements have been made by or on behalf of Mosleh, Enterprise Rent A Car, the owner of the car Mosleh was driving, or any other insurer.

The parties also stipulated to the admissibility of a letter dated April 22, 2013 from State Farm's Claim Processor to Main reflecting the referral of her claim to State Farm's Subrogation Services Department; and a second letter sent on the same day by State Farm to Enterprise Rent A Car seeking recovery of the full amount of State Farm's payment to Main.

Mosleh moved in limine to bar Main from recovering damages already paid to her by State Farm, or for an order deducting the insurance carrier's payment from any award rendered after trial. Although it is not in the record, the trial court apparently agreed with

Mosleh, as it awarded Main a total of $500 in damages. Determining that Mosleh was the prevailing party (Code Civ. Proc., § 1032) because he had successfully argued that Main was only entitled to recover $500 instead of the full $28,955.85 that Main sought, the court awarded Mosleh $811 in costs and attorney fees. Main's timely appeal followed.

CONTENTIONS

Main contends that the trial court erred in refusing to apply the collateral source rule and in awarding attorney fees to Mosleh.

DISCUSSION

The collateral source rule "provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment *should not be deducted from the damages* which the plaintiff would otherwise collect from the tortfeasor." (*Hrnjak v. Graymar, Inc*. (1971) 4 Cal.3d 725, 729, italics added; *Helfend v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 1, 6 (*Helfend*).) The rule "expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities. Courts consider insurance a form of investment, the benefits of which become payable without respect to any other possible source of funds. If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit." (*Helfend*, *supra*, at p. 10.)

The collateral source rule applies in property damage cases (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 40 (*Shaffer*), citing *Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 349), and should have been applied here. The parties stipulated that Mosleh was liable for Main's $28,955.85; and he acknowledges that he is obligated to pay "full compensation." Yet, because the judgment required Mosleh to pay only $500, he has not fully compensated his victim. A contrary holding, as advocated by Mosleh, that the collateral source rule should not apply, would confer a substantial $28,455.85 windfall on Mosleh, the tortfeasor responsible for Main's property damage. (*Shaffer*,

supra, at p. 40.) Such a result would violate a policy behind the collateral source rule, namely that *the tortfeasor* "*should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide* [*herself*] *with insurance*." (*Helfend*, *supra*, 2 Cal.3d at p. 10, italics added.)

Mosleh contends that the collateral source rule should not apply because as soon as State Farm paid Main under her policy (except for the deductible amount) the carrier became partially subrogated to Main's claim against Mosleh. Application of the collateral source rule, Mosleh reasons, will wrongly subject *him to double liability*: once to Main for the entire amount of the damages, and once to State Farm, as subrogee, while Main will recover twice: once from State Farm and once from Mosleh.

"Subrogation does no more than assign to the insurer the claims of its insured against the legally responsible party." (*Miller v. Ellis* (2002) 103 Cal.App.4th 373, 381 (*Miller*).) "[I]t is the insurer's duty to protect its subrogation rights." (*Allstate Ins. Co. v. Mel Rapton, Inc*. (2000) 77 Cal.App.4th 901, 914.) Yet, State Farm as subrogee has not intervened in this action, despite Main's invitation. Nor has the insurance carrier filed a separate subrogation action against Mosleh. More important, the collateral source rule "has nothing to do with whether the *insurer* can recover in subrogation on its insured's contractual indemnification claim." (*Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co*. (2010) 182 Cal.App.4th 23, 35.) Rather, the rule "pertains to whether an *insured* may recover on its own behalf. [Citation.]" (*Ibid*.) State Farm's subrogation rights are simply not at issue here.

Adverting to Mosleh's argument, he is not at risk of double liability if the court applies the collateral source rule. Nor does the possibility of a double recovery by Main impose a double burden on *Mosleh*. After this action for the property damage arising from the collision is final, any subrogation proceeding that State Farm might bring against Mosleh to recover the insurance proceeds from him would be subject to the defense of splitting a cause of action and its cognate, res judicata. (*Allstate Ins. Co. v. Mel Rapton, Inc*., *supra*, 77 Cal.App.4th at pp. 904-905, 908-909; *Hodge v. Kirkpatrick Development, Inc*. (2005) 130 Cal.App.4th 540, 550-551.) As the sole tortfeasor, Mosleh

is simply required to fully compensate Main for his wrongdoing, namely pay the $28,955.85 in damages, irrespective of any insurance proceeds Main may have received. (*Helfend*, *supra*, 2 Cal.3d at pp. 6 & 10.) "The plaintiff's insurance is wholly independent from, and collateral to, the tortfeasor, and the tortfeasor is not permitted to benefit from the plaintiff's prudence." (*Barnes v. Western Heritage Ins. Co.* (2013) 217 Cal.App.4th 249, 260, citing *Helfend*, *supra*, at p. 10.)

As for Mosleh's concern that Main will reap a double recovery, the issue is irrelevant in this appeal, again because this is not a subrogation action involving State Farm. The collateral source rule "is intended to ensure that the right of an *injured party* to be *fully compensated* for all his or her damages is protected, *even if in some instances it entails that party obtaining double recovery* from both the insurer and the wrongdoer." (*Miller*, *supra*, 103 Cal.App.4th at p. 379, italics added, citing *Hrnjak v. Graymar, Inc.*, *supra*, 4 Cal.3d at p. 729-730; *Helfend*, *supra*, 2 Cal.3d at pp. 9-12; *Shaffer*, *supra*, 17 Cal.App.4th at pp. 40-41.) As *Helfend* explained, the feared "double recovery" by a plaintiff occurs infrequently because, upon payment, the insurer is subrogated to the rights of the insured as against the defendants who caused the injury (see *Helfend*, *supra*, at pp. 10-11), or the insurer may seek a refund from its insured. (*Hodge v. Kirkpatrick Development, Inc.*, *supra*, 130 Cal.App.4th at p. 550 [" '[w]here a subrogation provision exists, an insurer may recoup its payments directly from the tortfeasor *or* from the proceeds of the insured's action against the tortfeasor.' "], italics added, quoting from *Pacific Gas & Electric Co. v. Superior Court* (1994) 28 Cal.App.4th 174, 183.) Nothing prevents State Farm from bringing a separate action against Main to recover the insurance proceeds it paid her once she recovers damages from Mosleh. (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 273; *Hodge v. Kirkpatrick Development, Inc.*, *supra*, at p. 553.) Because State Farm did not intervene in this action, the rights as between plaintiff and her subrogee is a question for another day.

Mosleh's reliance on *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563 and *Ferraro v. Southern Cal. Gas Co.* (1980) 102 Cal.App.3d 33 (disapproved on other grounds in *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330) is misplaced. Unlike

here, the insurance carriers in *Garbell* and *Ferraro* brought subrogation actions. (*Garbell*, at p. 1566; *Ferraro*, *supra*, at p. 38.) When that happens, the "insurer 'stands in the shoes' of its insured and is substituted to its insured's rights and remedies to the extent of its payments . . . ." (Croskey et al., Cal. Practice Guide: Insurance litigation (The Rutter Group 2016) § 9:35, p. 9-7), and so the insurance proceeds "are no longer a collateral source." (*Garbell*, *supra*, at p. 1572; *Ferraro*, *supra*, at p. 47.)

In sum, the trial court erred in failing to apply the collateral source rule. As the result of our holding, the trial court's later ruling finding Mosleh to be the prevailing party and awarding him attorney fees on that basis must also be reversed.

DISPOSITION

The judgment is reversed and remanded to the trial court for further proceedings consistent with the views expressed in this opinion. Mosleh to bear costs of appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

STRATTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.